Supreme Court, U.S.
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No. _____

In the Supreme Court of the United States

DANIEL RAY WILKES

*Petitioner*

V.

STATE OF INDIANA,

*Respondent*

**On Petition for a Writ of Certiorari**

**To the Indiana Supreme Court**

# PETITION FOR WRIT OF CERTIORARI

JOHN GOODRIDGE, ESQ.
*Counsel of Record*
915 Main Street, Suite 208
Evansville, Indiana 47708
Tel. 812-426-0482

*Counsel for Petitioner*

## QUESTIONS PRESENTED

### Capital Case

1. Whether an ambiguous assertion of one's right to silence during a custodial interrogation is insufficient to terminate the interrogation even though the interrogating officer understood the request to be an assertion of that right?

2. Whether the Indiana death penalty statute violates the *Apprendi/Ring* Doctrine and unconstitutionally permits the court to determine the appropriateness of a sentence of death, life imprisonment, or a term of years?

3. The Indiana Supreme Court determined that the jury's inability to arrive at a unanimous decision with regard to the penalty should have been considered by the court in deciding the appropriate sentence, but this factor was not considered by the trial court; and, therefore, should have the Indiana Supreme Court remanded the case for resentencing?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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## PETITION FOR WRIT OF CERTIORARI

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The petitioner, Daniel Ray Wilkes, prays that the Supreme Court grant a writ of certiorari to review the judgment of the Indiana Supreme Court.

## OPINION BELOW

The opinion of the Indiana Supreme Court appears at Appendix A to the petition, p. 2, and is reported at 917 N.E.2d 675 (Ind. 2010).

## JURISDICTION

The judgment of the Indiana Supreme Court was entered on December 10, 2009. The Indiana Supreme Court denied a timely filed petition for rehearing on March 16, 2010. The order denying rehearing appears at Appendix E to the petition, p. 48.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

### Fifth Amendment to the United States Constitution

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

### Sixth Amendment to the United States Constitution

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence".

### Fourteenth Amendment, Section 1 to the United States Constitution

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

**Burns Ind. Code Ann. § 35-50-2-9 (2000)**

**Death sentence; life imprisonment without parole**

Sec. 9. (a) The state may seek either a death sentence or a sentence of life imprisonment without parole for murder by alleging, on a page separate from the rest of the charging instrument, the existence of at least one (1) of the aggravating circumstances listed in subsection (b). In the sentencing hearing after a person is convicted of murder, the state must prove beyond a reasonable doubt the existence of at least one (1) of the aggravating circumstances alleged. However, the state may not proceed against a defendant under this section if a court determines at a pretrial hearing under IC 35-36-9 that the defendant is an individual with mental retardation.

(b) The aggravating circumstances are as follows:

(1) The defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following:

(A) Arson (IC 35-43-1-1).

(B) Burglary (IC 35-43-2-1).

(C) Child molesting (IC 35-42-4-3).

(D) Criminal deviate conduct (IC 35-42-4-2).

(E) Kidnapping (IC 35-42-3-2).

(F) Rape (IC 35-42-4-1).

(G) Robbery (IC 35-42-5-1).

(H) Carjacking (IC 35-42-5-2).

(I) Criminal gang activity (IC 35-45-9-3).

(J) Dealing in cocaine or a narcotic drug (IC 35-48-4-1).

(2) The defendant committed the murder by the unlawful detonation of an explosive with intent to injure person or damage property.

(3) The defendant committed the murder by lying in wait.

(4) The defendant who committed the murder was hired to kill.

(5) The defendant committed the murder by hiring another person to kill.

(6) The victim of the murder was a corrections employee, probation officer, parole officer, community corrections worker, home detention officer, fireman, judge, or law enforcement officer, and either:

(A) the victim was acting in the course of duty; or

(B) the murder was motivated by an act the victim performed while acting in the course of duty.

(7) The defendant has been convicted of another murder.

(8) The defendant has committed another murder, at any time, regardless of whether the defendant has been convicted of that other murder.

(9) The defendant was:

(A) under the custody of the department of correction;

(B) under the custody of a county sheriff;

(C) on probation after receiving a sentence for the commission of a felony; or

(D) on parole;

at the time the murder was committed.

(10) The defendant dismembered the victim.

(11) The defendant burned, mutilated, or tortured the victim while the victim was alive.

(12) The victim of the murder was less than twelve (12) years of age.

(13) The victim was a victim of any of the following offenses for which the defendant was convicted:

(A) Battery as a Class D felony or as a Class C felony under IC 35-42-2-1.

(B) Kidnapping (IC 35-42-3-2).

(C) Criminal confinement (IC 35-42-3-3).

(D) A sex crime under IC 35-42-4.

(14) The victim of the murder was listed by the state or known by the defendant to be a witness against the defendant and the

defendant committed the murder with the intent to prevent the person from testifying.

(15) The defendant committed the murder by intentionally discharging a firearm (as defined in IC 35-47-1-5):

(A) into an inhabited dwelling; or

(B) from a vehicle.

(16) The victim of the murder was pregnant and the murder resulted in the intentional killing of a fetus that has attained viability (as defined in IC 16-18-2-365).

(c) The mitigating circumstances that may be considered under this section are as follows:

(1) The defendant has no significant history of prior criminal conduct.

(2) The defendant was under the influence of extreme mental or emotional disturbance when the murder was committed.

(3) The victim was a participant in or consented to the defendant's conduct.

(4) The defendant was an accomplice in a murder committed by another person, and the defendant's participation was relatively minor.

(5) The defendant acted under the substantial domination of another person.

(6) The defendant's capacity to appreciate the criminality of the defendant's conduct or to conform that conduct to the requirements of law was substantially impaired as a result of mental disease or defect or of intoxication.

(7) The defendant was less than eighteen (18) years of age at the time the murder was committed.

(8) Any other circumstances appropriate for consideration.

(d) If the defendant was convicted of murder in a jury trial, the jury shall reconvene for the sentencing hearing. If the trial was to the court, or the judgment was entered on a guilty plea, the court alone shall conduct the sentencing hearing. The jury or the court may consider all the evidence introduced at the trial stage of the proceedings, together with new evidence presented at the sentencing hearing. The court shall instruct the jury concerning the statutory penalties for murder and any other offenses for which the defendant was convicted, the potential for consecutive or concurrent sentencing, and the availability of good time credit and clemency. The court shall instruct the jury that, in order for the jury to recommend to the court that the death penalty or life imprisonment without parole should be imposed, the jury must find at least one (1) aggravating circumstance beyond a reasonable doubt as described in subsection (f) and shall provide a special verdict form for each aggravating circumstance alleged. The defendant may present any additional evidence relevant to:

(1) the aggravating circumstances alleged; or

(2) any of the mitigating circumstances listed in subsection (c).

(e) For a defendant sentenced after June 30, 2002, except as provided by IC 35-36-9, if the hearing is by jury, the jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed. The jury may recommend:

(1) the death penalty; or

(2) life imprisonment without parole;

only if it makes the findings described in subsection (l). If the jury reaches a sentencing recommendation, the court shall sentence the defendant accordingly. After a court pronounces sentence, a representative of the victim's family and friends may present a statement regarding the impact of the crime on family and friends. The impact statement may be submitted in writing or given orally by the representative. The statement shall be given in the presence of the defendant.

(f) If a jury is unable to agree on a sentence recommendation after reasonable deliberations, the court shall discharge the jury and proceed as if the hearing had been to the court alone.

(g) If the hearing is to the court alone, except as provided by IC 35-36-9, the court shall:

(1) sentence the defendant to death; or

(2) impose a term of life imprisonment without parole;

only if it makes the findings described in subsection (l).

(h) If a court sentences a defendant to death, the court shall order the defendant's execution to be carried out not later than one (1) year and one (1) day after the date the defendant was convicted. The supreme court has exclusive jurisdiction to stay the execution of a death sentence. If the supreme court stays the execution of a death sentence, the supreme court shall order a new date for the defendant's execution.

(i) If a person sentenced to death by a court files a petition for post-conviction relief, the court, not later than ninety (90) days after the date the petition is filed, shall set a date to hold a hearing to consider the petition. If a court does not, within the ninety (90) day period, set the date to hold the hearing to consider the petition, the court's failure to set the hearing date is not a basis for additional post-conviction relief. The attorney general shall answer the petition for post-conviction relief on behalf of the state. At the request of the attorney general, a prosecuting attorney shall assist the attorney general. The court shall enter written findings of fact and conclusions of law concerning the petition not later than ninety (90) days after the date the hearing concludes. However, if the court determines that the petition is without merit, the court

may dismiss the petition within ninety (90) days without conducting a hearing under this subsection.

(j) A death sentence is subject to automatic review by the supreme court. The review, which shall be heard under rules adopted by the supreme court, shall be given priority over all other cases. The supreme court's review must take into consideration all claims that the:

(1) conviction or sentence was in violation of the:

(A) Constitution of the State of Indiana; or

(B) Constitution of the United States;

(2) sentencing court was without jurisdiction to impose a sentence; and

(3) sentence:

(A) exceeds the maximum sentence authorized by law; or

(B) is otherwise erroneous.

If the supreme court cannot complete its review by the date set by the sentencing court for the defendant's execution under subsection (h), the supreme court shall stay the execution of the death sentence and set a new date to carry out the defendant's execution.

(k) A person who has been sentenced to death and who has completed state post-conviction review proceedings may file a written petition with the supreme court seeking to present new evidence challenging the person's guilt or the appropriateness of

the death sentence if the person serves notice on the attorney general. The supreme court shall determine, with or without a hearing, whether the person has presented previously undiscovered evidence that undermines confidence in the conviction or the death sentence. If necessary, the supreme court may remand the case to the trial court for an evidentiary hearing to consider the new evidence and its effect on the person's conviction and death sentence. The supreme court may not make a determination in the person's favor nor make a decision to remand the case to the trial court for an evidentiary hearing without first providing the attorney general with an opportunity to be heard on the matter.

(l) Before a sentence may be imposed under this section, the jury, in a proceeding under subsection (e), or the court, in a proceeding under subsection (g), must find that:

(1) the state has proved beyond a reasonable doubt that at least one (1) of the aggravating circumstances listed in subsection (b) exists; and

(2) any mitigating circumstances that exist are outweighed by the aggravating circumstance or circumstances.

## STATEMENT OF THE CASE

In the spring of 2006, Daniel Wilkes met Donna Claspell and Michael Baker while all three were being treated at a drug rehabilitation center. After discharge, Wilkes stayed with Donna and her two daughters, eight-year-old Sydne Claspell and thirteen-year-old Avery Pike. Wilkes told Baker that one night he awoke to find Avery "hunching on his leg," and that he and Avery then engaged in mutual oral sex. Wilkes later admitted to molesting Avery on a total of three or four occasions. On the evening of April 23 or the early morning of April 24, Donna found Wilkes and Avery together and told Wilkes that he would have to leave the home.

Around eight o'clock the next morning, Donna's neighbors observed Baker picking up Wilkes at the home, and one heard Wilkes say something like, "I've got to get out of here." That night, according to Baker, Wilkes kept looking out the windows and expressed concern that the police would come for him.

On April 26, the bodies of Donna, Sydne, and Avery were found in their home. Donna and Sydne were in the master bedroom. Donna had sustained multiple injuries, including a deep cut wound to the neck and blows to the head from a hammer and another blunt instrument. A knife was found under Donna's shoulder. Sydne had died from at least twenty-seven blows to the head, back, and shoulders from a hammer head and claw. Avery was found in her bedroom naked and face down on the bed. Her hands were bound behind her back with a cord, her ankle was tied to the bedpost, and she had been strangled with a piece of clothing.

Because Baker and Wilkes were seen leaving Donna's residence Monday morning, police sought both for questioning. Baker was at his ex-wife's home Wednesday evening when he saw on television that he was wanted for questioning. Baker called the State Police. Wilkes was located Wednesday evening in Vincennes. Wilkes was arrested on a child support warrant from Pike County, taken to the Vincennes Police Department, and turned over to the Evansville detectives.

Wilkes was initially interrogated in Vincennes. Wilkes was asked what he thought the police found at Donna's house and responded "something bad." Wilkes was told that Donna and her two (2) kids were killed and he responded "Why did I do it? Don't tell me I did it." Wilkes stated that he had vague flashes about seeing Donna on her bed dead. Wilkes agreed when detectives suggested that he had a flash of Avery face-down, leg tied to the bed, hands tied, and something wrapped around her neck. As to Donna, Wilkes said he did it. Wilkes said he tied Avery's hands behind her, choking her with a piece of clothing. Sydne was on the floor and Wilkes hit her like he hit her mother.

Several times during the marathon statement in Vincennes, Wilkes tried to stop the interrogation before having made any admissions. His first attempt was when he said "Well, I have, I'm still high and you're going to go away." Instead of honoring this attempt to terminate questioning, the detective responded "I can't go away. I can't do that." This response came from the same person who at the start of the interrogation advised Wilkes "You

can decide at any time to exercise these rights, not answer any questions, or make any statements."

This was not Wilkes' sole attempt to reclaim his right to cease questioning. A few questions later, Wilkes responded "No I can end this today with me, and I don't have to know shit." Instead of scrupulously honoring Wilkes' request, the detective suggests, instead, Wilkes has a duty to answer because "Donna's family . . . deserves an explanation . . . " The detective continued:

> I got a family that deserves an explanation . . . answer me this Danny what if something happened like this to your child *and the Police said well the guy said he wanted to end it all right there so we let him. But did you find out what happened, no . . . we can't do that, that family deserves the Police to find out what happened, ok . . . . And we got two small kids, ok so to think that we are going to go away, is not going to happen.*

Once again Wilkes is being told that his *Miranda* warnings were a sham, a formality with no substance. Wilkes' response to being told that the police won't go away was "you can now . . . , " yet another attempt to end the interrogation.

The detective's statement is important, because it demonstrates the detective understood Wilkes was seeking to end the interrogation. That is clear from the emphasized portion of the statement. The detective was hypothesizing that Wilkes' child was murdered and that he was asking Wilkes how Wilkes would feel if he was told by the police that ". . . the guy said he wanted to end it all right there so

we let him." This demonstrates the detective's clear understanding that Wilkes had tried to end the questioning. The detective continues with the victim's family hypothetically asking "But did you find out what happened . . . ." To this the detective tells Wilkes ". . . we can't do that, that family deserves the police to find out what happened, ok . . . ."

No magic words are required to invoke one's right to silence. Certainly if the interrogator understands the suspect is requesting a cessation of questioning then that is sufficient. The detective's response to Wilkes' request indicates rather clearly the detective understood Wilkes was requesting to stop. Wilkes is then asked another question to which Wilkes makes yet another attempt to end the interrogation saying:

> I don't want to talk about it no more. I don't want to think about it. Cause right now I'm still high . . .

Questioning continued. When the detective was asked about this by Wilkes' attorney at the Motion To Suppress Statements hearing, the following exchange occurred:

> A. Why did I not stop?
> Q. Yes.
> A. He didn't ask for an attorney.
> Q. Is that the only reason you would have stopped, is if he asked for an attorney?
> A. If he asked for an attorney or counsel, to consult with counsel, we would have stopped.

> Q. So no matter how many times he would have said I don't want to talk about it any more, you would have still continued?
> A. Until he asked for an attorney or a lawyer, I would probably have continued.

This came from the person who had earlier assured Wilkes he could cease answering questions at any time.

Shortly after giving the above testimony the detective was asked a leading question by the prosecutor about what he would have done if Wilkes made it "completely clear and unequivocal" he wanted to stop. Predictably, the detective gave the answer suggested by the leading question - - "I would have stopped the interview." Apparently the detective was unaware that something other than a request for counsel required termination of questioning until he was educated otherwise by the prosecutor's question.

Wilkes was charged with all three murders. The State filed a death penalty request alleging as a statutory aggravating circumstance of each murder that Wilkes had committed multiple murders and, as to Sydne, that the victim was less than twelve years old.

The jury found Wilkes guilty of all three murders. In the penalty phase, the jury found all four aggravating circumstances and found that the aggravating circumstances outweighed the mitigating circumstances, but could not agree on a sentencing recommendation. After discharging the jury, the trial court conducted the sentencing. The court accepted the jury's findings and independently found the aggravating circumstances and

that the aggravating circumstances outweighed the mitigating circumstances. The court did not consider the fact that the jury could not recommend an appropriate sentence in determining sentence, although the Indiana Supreme Court subsequently reconsidered its prior rulings and determined it is now appropriate for a court to consider the jury's indecision as a sentencing factor in a capital proceeding.

For each murder, the trial court sentenced Wilkes to death.

## REASONS FOR GRANTING THE PETITION

### 1. Detectives continued a custodial interrogation of Wilkes despite the belief of one of the detectives that Wilkes had asserted his right to silence thereby violating the Fifth Amendment to the United States Constitution.

During the custodial interrogation of Wilkes in Vincennes he appears to have asserted his right to silence when he said, "No I can end this today with me, and I don't have to know shit." Although the attempt may have been ambiguous, the response of the detective leads to the conclusion that he understood that Wilkes was asserting his Fifth Amendment right. Wilkes should not have been questioned further and the use of his responses to subsequent questions were improperly used against him at trial.

In *Davis v. United States*, 512 U.S. 452, 459 (1994) the Court held that for an apparent request for counsel to require the cessation of a custodial interrogation the request

must be unambiguous. The standard used in determining if such a request has been made is an objective one. *Davis*, 512 U.S. at 458-59. The reasoning and rule of *Davis* have been extended to one's assertion of his right to silence. *Berghius v. Thompkins*, - - U.S. - - (June, 2010).

Here, Wilkes' request may have been objectively ambiguous. However, the detective understood his request to be one to cease questioning. If the purpose of an unambiguous assertion is to assure that one is asserting his right to silence then that purpose is fully served when the interrogating officer understands that an objectively ambiguous request is, in fact, such a request. To draw a distinction between the two would lead to the absurdity of an objectively unambiguous request not subjectively understood as such by the officer requiring suppression of a statement when an ambiguous request which the officer understands to be an assertion of one's right would lead to an admissible statement.

**2. The Indiana death penalty statute violates the *Apprendi/Ring* Doctrine and unconstitutionally permits the court to weigh aggravating circumstances against mitigating and determine the appropriateness of a sentence of death, life imprisonment, or a term of years.**

The "weighing" component of Indiana's death penalty scheme is a *Ring* element. *See Ring v. Arizona*, 536 U.S. 584 (2002); and, *see also Apprendi v. New Jersey*, 530 U.S. 466 (2000). Under I.C. §35-50-2-9, if the jury finds the existence of at least one (1) aggravating circumstance under I.C. §35-50-2-9(b), it appears the jury is asked to perform two (2) tasks. The first task requires the jury

consider whether aggravating circumstances outweigh the mitigating; and, the second task requires the jury to make a unanimous sentencing recommendation, based on the weighing, as to whether the defendant should be sentenced to death, life without parole, or a term of years. I.C. §35-50-2-9(e), (l). Indiana's statute suggests these two (2) tasks are related to one another, as the recommendation should be based upon the "weighing" process and findings required by I.C. §35-50-2-9(l); however, I.C. §35-50-2-9(e) still requires the jury to find that death is appropriate. I.C. §35-50-2-9(e).

I.C. §35-50-2-9(e) requires the "jury shall recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed." I.C. §35-50-2-9(e), this constitutes a finding and is the "functional equivalent" of an element of a capital offense. A defendant does not become death-eligible until a jury finds death appropriate under I.C. §35-50-2-9(e), because I.C. §35-50-2-9(l) does not require the imposition of death merely because aggravating circumstances outweigh mitigating. The finding that aggravating circumstances outweigh mitigating is a fact that, if found, merely exposes a defendant to an enhanced sentence.

The response to this reasoning would be the appropriateness step defined in I.C. §35-50-2-9(e) is not a finding at all; but, merely a procedural part of the sentencing process. That is, the only findings necessary to make a defendant eligible for death are: (1) a conviction for a capital offense; and (2) a finding that one (1) of the statutorily-enumerated aggravating circumstances exists. Once those two (2) things have been found, death is now within the sentencing range, and the dictate "the jury shall

recommend to the court whether the death penalty or life imprisonment without parole, or neither, should be imposed," required by I.C. §35-50-2-9(e) becomes substantively meaningless.

This understanding is flawed. Although steps (1) and (2) are *necessary pre-requisites*, they are not *sufficient* to impose a death sentence by themselves. These findings make a defendant "death-eligible" only in the sense you cannot impose a death sentence without them; i.e., they are *necessary conditions*. Even with such findings, a death sentence is not available until a jury determines aggravating circumstances outweigh mitigating and death is appropriate. The *appropriateness finding* under I.C. §35-50-2-9(e) is the finding that exposes a defendant to death. The actual recommendation of death constitutes the final step in the process; when the jury engages in "*old school*" sentencing; i.e., selecting punishment.

In *Apprendi*, the Court held ""[o]ther than . . . a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt . . . [and further] it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed." *Apprendi*, 530 U.S. at 490. The statutory range for murder is a term of years, forty-five (45) to sixty-five (65) years. I.C. §35-50-2-3. Only after a jury has determined that death or life imprisonment is appropriate, is the statutory maximum prescribed by statute increased under I.C. §35-50-2-9. Exposure to the death penalty only turns upon a finding by the jury that death is

the appropriate sentence, as between life without parole and a term of years. I.C. §35-50-2-9(e).

While the conviction, the return of at least one (1) statutory aggravating circumstance, and a finding the aggravating circumstances outweigh mitigating all make a defendant "eligible" for death in the Eighth Amendment sense – in that they narrow the class of persons on whom death might be imposed – those findings are not statutorily *sufficient* in a Sixth Amendment *Apprendi/Ring* sense to expose a defendant to a death sentence. Death is "justified," i.e. *authorized*, only after the fact-finder has determined death is appropriate in lieu of other options. Absent that finding, death is simply not within the range. I.C. §35-50-2-3. In the case of a "hung jury," the maximum sentence which may be imposed by the court is a term of years. The sentences of death in this matter were imposed in violation of the Sixth Amendment.

**3. The Indiana Supreme Court determined that the jury's inability to arrive at a unanimous decision with regard to the penalty should have been considered by the court in deciding the appropriate sentence, but this factor was not considered by the trial court; and, therefore, the Indiana Supreme Court should have remanded the case for resentencing.**

The trial court considered the issue of whether the jury's inability to arrive at a unanimous decision with regard to the penalty should be considered in deciding Wilkes' sentences. While the trial court concluded the law in Indiana that presently existed was clearly stated in *Roche v. State*, 596 N.E.2d 896, 899 (Ind. 1992), where this Indiana Supreme Court held that a jury's inability to reach

a recommendation "should not be considered as a mitigating factor during the penalty phase;" the court reasoned that this rule could be revisited as a result of changes which have occurred with regard to standards and procedures in capital cases. *See Burris v. State*, 642 N.E.2d 961 (Ind. 1994).

The trial court reasoned the first of these changes is the narrowing of the trial court's permitted considerations in determining an appropriate penalty. The court asserted guidance was limited as to how it was to choose between a sentence of death, life imprisonment, or a terms of years. The trial court reasoned Indiana's capital sentencing scheme was modified in 2002, and the jury's recommendation with regard to the penalty in capital cases was now binding upon the court, rather than advisory. The trial court's quandary showed the court was uncomfortable it could not consider the fact the jury was not able to reach a sentence recommendation.

In considering this issue on appeal, the Indiana Supreme Court reasoned and held:

> In this case, the trial court considered itself bound by *Roche* and concluded that it could not consider the jury's lack of recommendation in selecting a penalty. The trial court noted that subsequent statutory amendments and case law could be viewed as relevant to the issue, but appropriately left any change in the law to this Court.
>
> We last visited this issue in 1996. In 2002, the General Assembly amended the death

penalty statute to make the jury's sentencing recommendation binding on the judge in most circumstances. I.C. § 35-50-2-9. We think this increased emphasis on the role of the jury provides a reason to reconsider the *Roche* line of cases. The lack of unanimity among the jurors does not bear on the defendant's conduct or any facts that tend to lessen his culpability. It does, however, demonstrate a level of uncertainty among the citizens who considered the evidence as to the appropriate penalty. It is therefore more properly considered a relevant consideration than a mitigating circumstance, but it is a factor the trial court should be permitted to consider in determining the appropriate sentence. We therefore reach the same result as the *Roche* and *Burris* dissenters and hold that it is "appropriate" for the trial court to consider the fact that the jury-whose recommendation would otherwise be binding-could not agree. We do not find the trial court's adherence to then-existing precedent to be error, much less reversible error. The trial court expressly stated its independent conclusion that the aggravating circumstances outweighed the mitigating circumstances and thus the death penalty was appropriate.

*Wilkes v. State*, 917 N.E.2d 675, 692-693 (Ind. 2010).

Death is different; and, irrespective of whether you classify the jury's inability to reach a sentencing recommendation as a "relevant consideration" or a "mitigating circumstance," it is apparent from the record this fact was not considered.

The trial court should have considered this factor and did not in arriving at its conclusion that death was approp-riate. The balancing process in a capital sentencing context is a delicate process; and, in this case the process was upset, "creat[ing] the possibility . . . of randomness." *Stringer v. Black*, 503 U.S. 222, 231 (1992). This United States Supreme Court has recognized:

> [W]e conclude . . . the sentencer ... [should] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death . . .
>
> *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982) (*citing*, *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978).

Wilkes proffered the jury's indecision was a basis not to impose the death penalty. In light of the fact the Indiana Supreme Court reconsidered its reasoning in *Roche* and *Burris*, the matter should have been remanded to the trial court for resentencing.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOHN GOODRIDGE, ESQ.
*Counsel of Record*
915 Main Street, Suite 208
Evansville, Indiana 47708
Tel. 812-426-0482

*Counsel for Petitioner*